No. 82-912

In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Appellees' motion to affirm fails to demonstrate that "the questions on which the decision of the cause depends are so unsubstantial as not to need further argument" (Sup. Ct. R. 16.1(c)).[1] Appellees also have moved to dismiss the appeal in this case, however, contending that the notice of appeal was filed prematurely and therefore not within 30 days after entry of the order sought to be appealed, as required by 28 U.S.C. 2101(a). We file this reply memorandum to address this specious argument.

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[1]One aspect of appellees' argument on the merits deserves response. Contrary to appellees' assertion (Mot. to Dis. 19 n.12), this Court has "accorded 'great weight to the decisions of Congress' even though the legislation implicated fundamental constitutional rights guaranteed by the First Amendment." *Fullilove* v. *Klutznick*, 448 U.S. 448, 472 (1980), quoting *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 102 (1973).

1. On August 5, 1982, the district court issued an order that (1) declared unconstitutional the provision of 47 U.S.C. 399 prohibiting editorializing by certain public broadcasting stations, (2) enjoined the Federal Communications Commission and others from enforcing that provision, and (3) provided that appellees "shall recover their costs and reasonable attorneys' fees" (J.S. App. 21a-22a). That order was entered on August 6, 1982. On August 16, 1982, the Commission filed what was styled a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e) "on the ground that the award to plaintiffs of reasonable attorneys' fees [is] barred by sovereign immunity because the award was not made in accord with the procedures or limitations of the Equal Access to Justice Act, 28 U.S.C. § 2412" (Mot. to Dis. App. 3a-4a). Appellees opposed this motion. On September 3, 1982, the Commission filed a notice of appeal from the district court order of August 5 (J.S. App. 23a-24a). Justice Rehnquist subsequently extended the time for docketing the appeal until December 1, 1982, and the appeal was docketed on that date. This Court's jurisdiction was invoked under 28 U.S.C. 1252, which provides in pertinent part:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States * * * holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies * * * is a party.

In the interim, the district court addressed the pleadings concerning attorneys' fees. The district court declined to treat the Commission's August 16 motion as a motion under Fed. R. Civ. P. 59(e). A minute order entered on November 1, 1982, by the clerk of the court, reports the following proceedings (App., *infra;* emphasis added):

> The Court Orders that its previous award of attorney fees is stricken from the judgment. Plaintiffs' opposition to the defendant [*sic*] motion to amend judgment is deemed a motion for attorney fees *and the defendant's motion to amend the judgment is deemed the opposition to a motion for attorney fees.*[2]

What the court deemed appellees' motion and the Commission's opposition are still pending.

2. Appellees argue (Mot. to Dis. 11-13) that the Commission's notice of appeal was not timely filed for the following reason. They contend (Mot. to Dis. 11-12) that the Commission's August 16 motion regarding attorneys' fees was a "motion for reconsideration" that "suspended the finality of the District Court's judgment" and terminated the running of the time for appeal. They appear to argue (*ibid.*) that the reported proceedings of November 1, 1982, constituted a final disposition of this case and that the time for appeal ran from that date. They therefore conclude (Mot. to Dis. 12-13) that the notice of appeal filed on September 3 was premature and consequently of no effect (see *Griggs* v. *Provident Consumer Discount Co.*, No. 82-5082 (Nov. 29, 1982) (notice of appeal to court of appeals filed while timely Rule 59 motion is pending is a nullity). And since another notice of appeal was not filed within 30 days after November 1, appellees maintain (Mot. to Dis. 12-13) that appellate jurisdiction is lacking. Appellees' argument is clearly incorrect for two independent reasons.

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[2]This is apparently the "motion" to which appellees refer (Mot. to Dis. 10 n.5) when they state that "[t]he District Court then entertained and took under submission appellees' motion for an award of reasonable costs and attorneys' fees."

a. First, appellees' argument is predicated upon the false assumption that an appeal to this Court under 28 U.S.C. 1252, like an appeal to the court of appeals under 28 U.S.C. 1291, may be taken only from a final judgment. Thus, appellees argue that the Commission's motion regarding attorneys' fees rendered the August 5 order "nonfinal" (Mot. to Dis. 11) and "suspended the finality of the District Court's judgment until November 1, 1982" (Mot. to Dis. 12). However, 28 U.S.C. 1252 "applies to interlocutory as well as final judgments, decrees, and orders" declaring an Act of Congress unconstitutional (*McLucas* v. *DeChamplain*, 421 U.S. 21, 30 (1975)). Accordingly, it is utterly irrelevant whether the motion concerning attorneys' fees rendered the August 5 order "nonfinal" or "suspended the finality" of the district court's judgment. Because 28 U.S.C. 1252 permits an appeal from interlocutory orders, appellees' entire argument collapses, and it becomes apparent that the appeal in this case was taken within the time precribed by the Rules of this Court and the relevant statutes.

Sup. Ct. R. 11.2 provides that an appeal from a district court order declaring an Act of Congress unconstitutional "*shall be in time* when the notice of appeal * * * is filed with the clerk of the appropriate court within the time allowed by law for taking such appeal and the case is docketed within the time provided in Rule 12" (emphasis added). These requirements were met in the present case. "The time for filing the notice of appeal runs from the date the judgment or decree sought to be reviewed is rendered" (Sup. Ct. R. 11.3). Here, the "judgment or decree sought to be reviewed" was the portion of the August 5 order (whether considered interlocutory or final) holding a provision of 47 U.S.C. 399 unconstitutional.[3] The notice of appeal was filed within

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[3]By contrast, under 28 U.S.C. 1291, the asserted basis for appellate jurisdiction in *Griggs* (see *Griggs* v. *Provident Consumer Discount Co.*, 680 F.2d 927, 929 (3d Cir. 1982)), the appeal must be taken from

30 days after the entry of that order, as required by 28 U.S.C. 2101(a), and the appeal was timely docketed. Accordingly, the appeal was "in time" under Sup. Ct. R. 11.2.

Appellees rely (Mot. to Dis. 11) upon the provision of Sup. Ct. R. 11.3 that states that "if a petition for rehearing is timely filed by any party in the case, the time for filing the notice of appeal for all parties * * * runs from the date of the denial of rehearing or the entry of subsequent judgment." However, this provision, which was added in 1980, does not provide, as the 1979 revision of Fed. R. App. P. 4(a)(4) does, that a premature notice of appeal is a nullity. Even if such a gloss may be inferred, it should apply only to appeals under 28 U.S.C. 1257, which must be from "[f]inal judgments or decrees," and not to appeals under 28 U.S.C. 1252. Applying such a rule to appeals under Section 1252 would frustrate Congress' intent and would lead to absurd results.

Section 1252 was framed to permit speedy, conclusive appellate adjudications when acts of Congress are held unconstitutional in civil cases in which the federal government or its officer is a party and will therefore be bound. See *McLucas* v. *DeChamplain, supra,* 421 U.S. at 31; *Fleming* v. *Rhodes,* 331 U.S. 100, 104 & n.6 (1947); H.R. Rep. No. 212, 75th Cong., 1st Sess. 2 (1937) (provision allowing direct appeal is designed to ensure a "prompt determination by the court of last resort of disputed questions of the constitutionality of acts of the Congress"). Thus, immediate

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the final order, and the time for filing a notice of appeal therefore begins to run from the entry of that order. See Fed. R. App. P. 4(a). Since a timely motion under Fed. R. Civ. P. 59(e) destroys the finality of any prior judgment, when such a motion is filed the time for filing a notice of appeal runs from the disposition of that motion, and a notice of appeal filed while that motion is pending is premature and a nullity. Fed. R. App. P. 4(a)(4); *Griggs* v. *Provident Consumer Discount Co., supra,* slip op. 5.

appeal to this Court is authorized, and appeals may be taken from interlocutory as well as final orders. Indeed, this Court has allowed an immediate appeal under Section 1252 when a district court grants a preliminary injunction on the ground that a federal statute is unconstitutional, even though the court might reverse its holding at or before the permanent injunction stage. *McLucas* v. *DeChamplain, supra*, 421 U.S. at 31; *Fleming* v. *Rhodes, supra*, 331 U.S. at 103-104.

Appellees' argument — that an appeal may not be taken when collateral matters are under reconsideration by the district court — is contrary to this plan. Since a preliminary holding of unconstitutionality is immediately appealable to this Court under 28 U.S.C. 1252 even though the district court might modify it in later stages of the proceedings, it is hard to understand why a conclusive adjudication of unconstitutionality should not be appealable while collateral issues are being reconsidered. And since an appeal under 28 U.S.C. 1252 may be taken from an interlocutory order (which means that an appeal may be taken even though certain claims or requests for relief have not been considered at all by the district court), it is hard to see why an appeal should be precluded when these same matters are being *re*considered by the district court. Moreover, acceptance of appellees' argument would mean that an appeal of an interlocutory order holding a federal statute unconstitutional could be prevented by the simple expedient of moving for reconsideration of a previously decided collateral matter. This could delay review by this Court of decisions striking down an Act of Congress, perhaps indefinitely, pending the district court's reconsideration of collateral and often relatively insignificant matters. Here, for example, more than six months have elapsed since the district court declared a provision of 47 U.S.C. 399 unconstitutional, and the collateral issue of attorneys' fees has not yet been resolved.

Appellees rely (Mot. to Dis. 12) by way of analogy upon a provision of Fed. R. App. P. 4(a)(4) stating that a notice of appeal filed while certain post-judgment motions are pending "shall have no effect." That provision, of course, does not apply to appeals to this Court (see Fed. R. App. P. 1(a)), and the policies that led to its promulgation are also inapplicable in this context. As the Court explained in *Griggs* v. *Provident Consumer Discount Co., supra,* slip op. 3, Rule 4(a)(4) was issued in its present form out of concern that the district courts and the courts of appeals "would be simultaneously analyzing the same judgment."[4] In this case, however, the sole subject of the Commission's August 16 motion — attorneys' fees — is wholly separate from the only question raised in the Commission's jurisdictional statement —the constitutionality of 47 U.S.C. 399. There is thus no danger that this Court and the district court will be "simulatenously analyzing the same judgment" (*Griggs* v. *Provident Consumer District Co., supra,* slip op. 3).

b. Even if the pendency of a true motion to alter or amend the judgment would have precluded an appeal under 28 U.S.C. 1252, there would still be no basis for dismissing the present appeal. The Commission's motion regarding

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[4]Before 1979, when this possibility remained merely "theoretical," it caused neither this Court nor the courts of appeals undue concern, and the practice had evolved that "if the notice of appeal was filed after the motion to vacate, alter, or amend the judgment * * * the district court retained jurisdiction to decide the motion, but the notice of appeal was nonetheless considered adequate for purposes of beginning the appeals process." *Griggs* v. *Provident Consumer Discount Co., supra,* slip op. 3. When, due to other changes in the rules of appellate procedure, the possibility of two courts simultaneously analyzing the same judgment became an actual possibility, this Court promulgated the provision of Rule 4(a)(4) stating that a "notice of appeal filed before the disposition of [a Rule 59(e) motion to alter or amend the judgment] * * * shall have no effect." See Advisory Committee Note to subdivision (a)(4) of Fed. R. App. P. 4, 28 U.S.C. App. (Supp. V), at 146.

attorneys' fees was not properly a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e) and was not regarded as such by the district court. In *White* v. *New Hampshire Department of Employment Security*, 455 U.S. 445 (1982), this Court held that a motion for attorneys' fees under 42 U.S.C. 1988 was not a Rule 59(e) motion and thus did not destroy the finality of an otherwise final judgment. The Court reasoned (455 U.S. at 451; footnote omitted) that Rule 59(e) has generally been invoked "only to support reconsideration of matters properly encompassed in a decision on the merits" and that "a request for attorney's fees under § 1988 raises legal issues collateral to the main cause of action — issues to which Rule 59(e) was never intended to apply."

This reasoning applies here. The Commission's motion regarding attorneys' fees did not concern the merits of the constitutional questions presented by this case but instead involved legal issues wholly collateral to the main cause of action. In apparent recognition of these facts, the district court declined to treat the Commission's motion as one to alter or amend the judgment. Instead, the court deemed appellees' opposition to the Commission's motion to be a motion for attorneys' fees, and the court treated the Commission's motion as an opposition to that request. See App., *infra*. Thus, since no motion to alter or amend the judgment was properly filed in this case, there would be no basis for treating the notice of appeal as a nullity even if Fed. R. App. P. 4(a)(4) applied to appeals to this Court.

For these reasons and the reasons stated in our jurisdictional statement, it is repectfully submitted that probable jurisdiction should be noted.

REX E. LEE
Solicitor General

FEBRUARY 1983

DOJ-1983-02

APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORMIA

CIVIL MINUTES — GENERAL

Case No. CV79-1562-MML Date November 1, 1982

Title League of Women Voters, et al. -v- F. C. C.

PRESENT:

HON. MALCOLM M. LUCAS, JUDGE

Duane Hostetter	Don Mehler
Deputy Clerk	*Court Reporter*

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
Fredric Woocher	Judith Ledbetter, USDJ

PROCEEDINGS:

Counsel are present. The Court Orders that its previous award of attorney fees is stricken from the judgment. Plaintiffs' opposition to the defendant motion to amend judgment is deemed a motion for attorney fees and the defendant's motion to amend the judgment is deemed the opposition to a motion for attorney fees.

The motion for an award of attorney fees is argued to the Court. The Court takes the motion under submission.

Initials of Deputy Clerk *[illegible]*